FILED
MAR 30 195
HAROLD B. WILLEY, C

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 587.

THE G. & P. AMUSEMENT COMPANY,
Petitioner,

vs.

REGENT THEATER COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., AND LOEW'S INCORPORATED.

LUTHER DAY,
1759 Union Commerce Bldg.,
Cleveland 14, Ohio,
Attorney for Distributor Respondents Warner Bros. Distributing Corporation, Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., and Loew's Incorporated.

THOMAS M. HARMAN,
GEORGE H. RUDOLPH,
1759 Union Commerce Bldg.,
Cleveland 14, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

BLEED THROUGH POOR COPY

TABLE OF CONTENTS.

Questions Presented 1

Statement of Case 2

Argument 8

Question I. Did the Respondents Conspire to Prefer the Regent Theater Over the Moreland Theater in the Distribution and Licensing of Motion Pictures in the Area in Which Those Theaters Were Located? 9

1. Petitioner's First Question 12

2. Petitioner's Second Question 16

Question II. Was Petitioner Injured in Its Business or Property As a Result of Any Act or Acts of Respondents Alleged or Claimed by Petitioner to Have Been in Violation of the Antitrust Laws of the United States? 17

Conclusion 19

TABLE OF CASES.

Schine Chain Theaters v. United States, 334 U. S. 110 (1948) 9, 10, 11

United States v. Crescent Amusement Co., 323 U. S. 173 (1944) 9, 10, 11

United States v. Griffith, et al., 334 U. S. 100 (1948) 9, 10, 11, 17

United States v. Gypsum Co., 333 U. S. 364 19

United States v. Oregon Med. Soc., 343 U. S. 326 19

United States v. Paramount, et al., 334 U. S. 131 (1948) 9, 10

United States v. Yellow Cab Co., 338 U. S. 338 19

BLEED THROUGH POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 587.

THE G. & P. AMUSEMENT COMPANY,
Petitioner,

vs.

REGENT THEATER COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., AND LOEW'S INCORPORATED.

QUESTIONS PRESENTED.

I.

Did the respondents conspire to prefer the Regent theater over the Moreland theater in the distribution and licensing of motion pictures in the area in which those theatres were located?

II.

Was petitioner injured in its business or property as a result of any act or acts of respondents alleged or claimed by petitioner to have been in violation of the anti-trust laws of the United States?

STATEMENT OF CASE.

Petitioner claims that this case involves unlawful misuse of buying power by a motion picture buying "combine" (Pet. p. 4), namely, respondent Cooperative, which is operated by respondent Mooney. No claim is now made that distributor respondents conspired with each other to injure petitioner, and the District Court found as a fact that they did not (Fdgs. 57, 80-82, R. I, 175a, 180a).[1] It is petitioner's argument that Cooperative used the buying power of its customers located in non-competitive situations to coerce each of the distributor respondents separately to discriminate in favor of Cooperative's customer, Gusdanovic's Regent theater, to the detriment of the latter's competitor, petitioner's Moreland theater, in a competitive situation. The District Court found to the contrary (R. I, Fdgs., 77, 78, 85, 86; 179a, 180a), and the Court of Appeals unanimously affirmed those findings. Petitioner makes no attempt to show that those findings are clearly erroneous.

So far as the distributor respondents are involved, many of the facts discussed by petitioner which do not relate to their alleged coercion, such as Mooney's business philosophy, and Gusdanovic's alleged preference of the Regent over the Moreland when he controlled both theaters, are of no concern, and will not be discussed. Petitioner's statement of the facts, however, does not present the situation involved in its true perspective.

The Regent and the Moreland are located on opposite sides of Buckeye Road in Cleveland, about a block apart, the former on the northeast corner of Buckeye Road and East 117th Street and the latter on the opposite side of the

---

[1] For convenience, the District Court's findings are designated Fdg.; and the two volumes of the record in this Court are designated I and II, respectively.

BLEED THROUGH POOR COPY

street about a block east of the Regent. They are located in a foreign language neighborhood where a great portion of the residents speak or understand Hungarian (Fdg. 22, R. I, 166a). Both theaters were originally operated on a second run policy, showing pictures 35 days after the first run in downtown Cleveland (Fdg. 19, R. I, 165a). Since the construction of the Colony theater at nearby Shaker Square in 1937 the Regent and Moreland have been third run, showing pictures 7 days after the Colony (Fdg. 18, R. I, 165a).

The Regent, built in 1920, originally had about 960 seats. It was purchased in 1926 by Gusdanovic and a partner for $195,000. It was then enlarged to a capacity of 1500 seats, and completely remodeled and modernized at a cost of $60,000 to $75,000 in 1926 (Fdg. 14, R. I, 164a). Gusdanovic commenced operating the Regent in the summer of 1926 (R. II, 294a).

When Gusdanovic took over the Regent it had available the product of the four distributor respondents, and also that of RKO, Columbia, Paramount and United Artists (Fdg. 19, R. I, 165a).

The Moreland was built in 1927 and opened January 1928. Its first tenant was U-B Theatrical Enterprises, Inc., a company then affiliated with Universal (Fdg. 15, R. I, 164a). When the Moreland opened, Universal began to show its product in the Moreland rather than the Regent.

In 1928 or 1929, the Moreland was taken over by experienced local operators (Fdg. 16, R. I, 164a). It was unsuccessful from the beginning. The theater, although it had as much product as the Regent, consistently lost money on an average of $500 a week (Fdg. 16, R. I, 165a).

Later, in October 1929, the lease and equipment of the Moreland were sold to the respondent Gusdanovic at a substantial loss to the original lessee (Fdg. 17, R. I, 165a).

Gusdanovic operated both the Regent and the Moreland from October 1929 to October 1937.

When the expiration of the lease approached in 1937, the landlord demanded an increase in rent and a provision in any new lease that the Moreland must be kept open seven days a week (Fdg. 22, R. I, 166a). Gusdanovic, who had lost over $80,000 in operating the Moreland from 1929 to 1937 (Fdg. 24, R. I, 167a), refused to meet such terms and the Moreland was then leased to petitioner, effective October 1, 1937 (Fdg. 22, R. I, 166a, 167a).

By 1937 the Moreland had become hopelessly outclassed by the Regent, and "had acquired the reputation of being a theater inferior to the Regent" (Fdg. 67, R. I, 176a).

Petitioner was organized in June 1937 by members of the Greenberger and Polster families (R. II, 148a) and commenced operating the Moreland on October 1, 1937. When petitioner took over operation of the Moreland, it was the practice in the motion picture industry for a producer to sell a full season's product at one time. Therefore, except for Paramount product, three years' accumulation of which was available to the Moreland, product for the 1937-1938 season had already been licensed to the Regent. With the advent of the 1938-1939 season, motion picture distributors had a choice between the Regent and the Moreland in the sale of their product for the prior run exhibition in the area. The distributor respondents, Warners, Fox, Universal and Loew's, continued in general to sell their product on the prior run in the neighborhood to the Regent (Fdg. 38, R. I, 171a).[2] The product of other companies, however, was available to the Moreland; i.e., all product of Paramount and Monogram and one-half of

---

[2] Loew's inaugurated competitive bidding between the two theaters in 1946.

BLEED THROUGH POOR COPY

that of RKO, United Artists and Columbia (Fdg. 37, R. I, 170a; R. II, 158a, 159a, 161a). On product licensed to each theater it had a clearance of seven days ahead of the other (Fdg. 64, R. I, 176a).

The Colony Theater was opened in December 1937, in the Shaker Square business district, about a half mile from the Regent and the Moreland, and was granted seven days' clearance over both the Regent and the Moreland. It is a large theater, completely modern in every respect, with extensive parking lot facilities for patrons, which neither the Regent nor the Moreland has (Fdg. 18, R. I, 165a). The opening of the Colony, of course, tended to draw business from both the Regent and the Moreland (Fdg. 77, R. I, 179a) which for years previously had been unable to make money when both were operated by Gusdanovic.

In February 1938, respondent Mooney, who had been employed by Warners as its branch exchange manager in Cleveland and had left its employ in January 1938, organized respondent Cooperative for the purpose of servicing small independent exhibitors in the Cleveland exchange area in the buying and booking of motion picture films for them (Fdg. 27, R. I, 168a). It commenced operations in September 1938 with 22 accounts (Fdg. 28, R. I, 168a; R. II, 305a).

In March 1938, Gusdanovic agreed to become a customer of Cooperative for his four theaters (Fdg. 29, R. I, 169a). When Cooperative commenced operations in September 1938, it bought and booked films for the Regent. This, of course, was almost a year after petitioner had taken over the Moreland.

Cooperative's business with the respondents represented a good portion of the total business done by each in the Cleveland area, but it was by no means the major portion. Thus, Cooperative's business with Warners averaged

only from 9 to 15 per cent of total billing, and with Fox from 7 to 15 per cent (Fdg. 35, R. I, 170a). Cooperative was entirely independent of the small exhibitors who were its customers, as were they of it. Cooperative's customers had no interest, financial or otherwise, in Cooperative, and it had none in them. Any customer could dispense with its services, and Cooperative could cease representing any customer at any time either saw fit (Fdgs. 30-34, R. I, 169a, 170a).

While both theaters located in towns where there was only one theater and theaters located in towns where there was more than one theater were dealt with at the same meetings between Cooperative and a distributor respondent, there was in fact a separate negotiation with respect to each picture for each theater. The District Court found as a fact that neither Mooney nor Cooperative used the one theater town, or non-competitive, situations which they represented to obtain product for the Regent, or any advantage or privilege for it over the Moreland, from any of the distributor respondents (Fdg. 78, R. I, 179a).

The Greenberger and Polster interests, which owned petitioner, operated the Moreland from October 1937 to February 9, 1948. In 1942 they renewed the plaintiff's five year lease on the Moreland at an increased rental. In 1947 they again renewed the lease for a period of ten years (Fdg. 69, R. I, 177a).

The Regent consistently outgrossed the Moreland on product which it exhibited first in the neighborhood during the period from January 1, 1939 to March 18, 1950 (Fdg. 75, R. I, 178a). This was due, in large part, to the difference in physical equipment and upkeep of the two theaters. From at least 1940 on, the Regent was superior to the Moreland in its physical appointments, attractive-

BLEED THROUGH POOR COPY

ness, facilities and comforts for patrons (Fdg. 73, R. I, 178a).

On February 9, 1948, the stock of petitioner was sold by the Greenbergers and Polsters to Stutz, Schneider, Berush and Mendelson. The District Court found that when Stutz and his associates acquired the stock of petitioner and took over the Moreland, it would have cost between $75,000 and $100,000 to bring the physical appointments, equipment and facilities of the Moreland up to the level of those at the Regent at that time (R. I, Fdg. 74, 178a).

The Stutz interests operated the theater for two years from February 1948 to March 1950, when the Moreland was closed. In the meantime petitioner filed this action in October 1949. The situation as to product and the relative attractiveness of the two theaters continued to be the same as under the Greenberger and Polster regime. Stutz was the only member of the new management with any experience in the exhibition end of the motion picture industry, but he continued his full time occupation as manager of the Circle Theater (R. II, 164a, 165a). Under Stutz's management only $246.81 was spent for capital improvements of the Moreland (Fdg. 74, R. I, 178a).

From the time the Moreland was built in 1927 the neighborhood was not large enough to support two theaters of the size of the Regent and the Moreland. After the Colony commenced operations in December, 1937, this situation became even more aggravated (Fdg. 77, R. I, 179a). From 1938 through 1949 the Regent, itself, sustained losses in excess of $40,000 (Fdg. 77, R. I, 179a). It operated at a loss through the period with the exception of the years 1945, 1946 and 1947, which were exceptional years in the history of the motion picture exhibition

industry (R. II, 375a). During the years 1949 and 1950, the motion picture industry, partly because of television, suffered a great slump, and the Moreland, never a profitable theater, was only one of many fringe motion picture theaters throughout the nation and the Cleveland area which were compelled to close their doors (Fdg. 76, R. I, 179a).

Thus, as the District Court found, the failure of the Moreland resulted, not from any conspiracy, but rather from natural competitive causes (Fdgs. 77, 79-87, R. I, 179a-181a).

ARGUMENT.

There is no real question of law in this case. The only questions actually presented were questions of fact which were found against petitioner by the District Court, affirmed by the Court of Appeals. The District Court was clearly right when it said (R. I, 145a, 146a):

> "There is no substantial disagreement between the parties as to the general principles of law applicable here. In fact, both plaintiff and defendants cite the same adjudicated cases in support of their respective contentions. They part company, however, when they seek to apply the well-established principles of law to the facts developed by the testimony. * * * The real controversy in this case is factual, rather than legal in nature, and the existence or nonexistence of an unlawful conspiracy and the extent to which it produced the alleged damages must be resolved on the basis of the facts adduced."

BLEED THROUGH POOR COPY

QUESTION I.

DID THE RESPONDENTS CONSPIRE TO PREFER THE REGENT THEATER OVER THE MORELAND THEATER IN THE DISTRIBUTION AND LICENSING OF MOTION PICTURES IN THE AREA IN WHICH THOSE THEATERS WERE LOCATED?

The District Court summarized the essential elements of petitioner's case, all of which it had to establish by the evidence to entitle it to a judgment in its favor, as follows (R. I, 145a):

> "The defendants take the position that no recovery may be had unless the plaintiff established (1) that Cooperative actually possessed the monopoly buying power which is attributed to it and that it was capable of exercising that power in such a manner as to cause the distributors, independent of other considerations, to prefer the Regent over the Moreland; (2) that such buying power was, in fact, so exercised; (3) that the distributor-defendants did succumb to the dictation of Cooperative and 'knuckle' under the power of Cooperative and further that they did acquiesce in the alleged conspiracy; (4) that as a direct and proximate result of such wrongful conduct by the defendants the plaintiff was injured in its business; and (5) the actual amount of the damages sustained. There can be no question that these are the necessary prerequisites for a finding for the plaintiff. And plaintiff does not dispute it."

This statement of the law is fully supported by the decisions of this Court upon which petitioner relies, *United States v. Crescent Amusement Co.*, 323 U. S. 173 (1944); *United States v. Griffith, et al.*, 334 U. S. 100 (1948); *Schine Chain Theaters v. United States*, 334 U. S. 110 (1948); and *United States v. Paramount, et al.*, 334 U. S. 131 (1948).

The District Court, in its Findings of Fact (Fdgs. 78-87, incl., R. I, 179a, 180a), expressly found that the plaintiff had failed to establish by the evidence the existence of any one of the essential elements of its case as above outlined. The Court of Appeals held that these, as well as the rest of the District Court's eighty-seven findings of fact, were supported by substantial evidence (Pet. p. 28, App. D).

Petitioner asserts that the decisions of the courts below conflict with the decisions of this Court in the *Crescent, Griffith, Schine* and *Paramount* cases. There is no such conflict.

Petitioner misapprehends the decisions of the courts below when it asserts that they held that, although Cooperative carried on negotiations with the distributor respondents for all of its exhibitor customers at one time, such conduct *could not* run afoul of the anti-trust laws because Cooperative licenses and books pictures for theaters in which it has no financial interest, and none of which theaters has any financial interest in Cooperative.

The courts below did not so hold but, to the contrary, held that on the facts established by the evidence in this case Cooperative did not have monopoly power and did not exercise monopoly power, and that the distributor respondents were not coerced or improperly influenced in their dealings as between the Moreland and the Regent by anything said or done by Cooperative. The District Court found specifically on this point as follows (R. I, 179a, 180a):

> "78. Neither Mooney nor Cooperative used the closed or non-competitive theater situations which Cooperative represented as a means of obtaining any product for the Regent or any advantage or prefer-

BLEED THROUGH POOR COPY

ence for the Regent over the Moreland from the distributor defendants or any of them.

"79. Each of the distributor defendants in choosing the Regent as its prior run customer rather than the Moreland did so on the merits of the Regent and without regard to the fact that Cooperative was employed to buy and book pictures for the Regent.

"85. Neither Mooney nor Cooperative had or exercised or attempted to exercise monopoly power in the negotiation for or licensing of films for the Regent from the distributor defendants.

"86. None of the distributor defendants was intimidated or coerced in their actions in the Regent-Moreland situation by any of the other defendants."

Petitioner asserted in the Court of Appeals that the above essential findings were not supported by the evidence. The Court of Appeals, however, held that those findings are supported by substantial evidence. The enormous differences between the facts of the case at bar and the facts of the *Crescent, Griffith* and *Schine* cases appears clearly from the statements of those cases in the opinions of this Court.

There are no restrictive agreements, such as formula deals, master agreements or blanket deals, involved in the case at bar, as the District Court specifically found (Fdgs. 56, 57, R. I, 174a, 175a). The license contracts between the exhibitors represented by Cooperative and each of the distributor respondents were the standard forms of contract used with all exhibitors, containing the usual and ordinary terms available to all exhibitors generally (Fdg. 56, R. I, 174a). Negotiations between Cooperative and distributor respondents were at all times on a basis of theater by theater and, after each distributor ceased selling on a season basis, picture by picture (Fdg. 43; R. I, 172), and never resulted in a circuit deal or "bushel

basket" deal, but in separate contracts for each theater, including the Regent, with respect to each picture involved (Fdgs. 47, 55; R. I, 173a, 174a).

The two questions which petitioner purports to present do not involve legal questions, but merely relate to questions of fact which have been determined against it by the lower courts.

1. Petitioner's First Question.

This case was tried in the District Court solely on the questions whether respondents had conspired to injure petitioner in its property and business of operating the Moreland theater, and, if so, whether any such conspiracy resulted in damage to petitioner. The District Court answered both questions in the negative and the Court of Appeals affirmed. Petitioner now, however, seeks to inject a legal question with respect to the respondent Cooperative based on the fact that Cooperative did not own the theaters which it represented. Petitioner in its purported first question seeks to imply a holding by the lower courts that was never made, namely, that the lower courts held that (1) Cooperative, because of lack of common ownership of theaters which it represented, could have no monopoly buying power from closed situations of certain of its customers as a matter of law; and that, therefore, (2) while Cooperative often dealt for all of its customers at one time "in a single negotiation" in a way which otherwise would have been illegal, (3) such conduct could not violate the antitrust laws solely because of absence of common ownership. The lower courts did not so hold.

First, as to lack of common ownership, the facts in this particular case disclosed that Cooperative and its customers had no common financial interest which would

BLEED THROUGH POOR COPY

justify Cooperative's refusing to license product advantageously for a customer in a non-competitive situation to force concessions for a customer in a competitive situation (R. I, 95a; Fdg. 30, R. II, 169a). Building up of Cooperative's buying power by such means would not help a customer in a non-competitive situation from the long range standpoint, because Cooperative could stop representing him at any time (R. II, 306a; Fdg. 31, R. I, 169a). The only testimony on the point in the record was that Cooperative would have lost its customers by such conduct (R. II, 311a, 323a, 303a). The District Court said (R. I, 156a):

> "Compelling logic, in this Court's view, directly refutes the plaintiff's contention that Mooney used his closed situations as a lever in negotiating for films for the Regent in preference over the Moreland. It is to be seriously doubted that an individual theater owner in a noncompetitive situation would suffer his position to be used in a manner, which may work to his detriment, as an instrument for obtaining the preferential treatment of an exhibitor with whom he had no particular connection other than the fact that they were both represented by Cooperative. To the contrary, it is more likely that he should object vigorously to such treatment, even to the point of refusing to purchase the services of Cooperative in the future. The fact was well-known and fully realized by all the parties concerned. In this respect, it is pertinent that no individual exhibitor represented by Cooperative had any financial interest in the operation of the company as a whole."

The District Court found as a fact, not as a matter of law, that Cooperative had no monopoly power (Fdg. 85, R. I, 180a).

Second, as to Cooperative's dealing for its customers in "a single negotiation," the District Court found as a fact that, while Cooperative negotiated for pictures for its

customers in non-competitive situations and for its customers in competitive situations at the same meeting with a particular distributor, the negotiations at the single meeting were conducted separately for each theater, and that Cooperative did not attempt to use its buying power for customers in non-competitive situations as a lever to obtain concessions for its customers in competitive situations. The District Court, in its opinion, stated (R. I, 155a):

> "The plaintiff seeks to establish Cooperative's wrongful use of its purchasing power by showing that Mooney customarily, in bargaining with the distributors, *joined together in a single preliminary contract*[3] theaters represented by Cooperative in 'closed situations' with those located in 'open situations.' Thus, it is claimed that Mooney was able to use the possibility of his refusal to buy in the closed market as a sword above the heads of the distributors to force them to prefer the Regent or any other theater which he represented in an open situation. This course of dealing, plaintiff argues with particular emphasis, is in direct violation of the 'theater by theater' and 'picture by picture' method prescribed by the Supreme Court in United States v. Paramount Pictures, Inc., supra, as the proper and lawful manner of negotiating for films.
>
> "The evidence here does not substantiate the contention that Cooperative used its representation of noncompetitive theaters to exact the preference of the Regent over the Moreland, despite the fact that Mooney often carried on negotiations with the distributor-defendants for all of Cooperative's customer theaters at one time. The mere representation by Cooperative of both competitive and noncompetitive clients, *in a single negotiation*, does not *per se* violate the mandate of 'picture by picture' and 'theater by theater' dealing."

---

[3] Emphasis throughout is supplied.

BLEED THROUGH POOR COPY

The reference to a "single preliminary contract" in the first sentence of the above portion of the District Court's opinion is to the so-called "deal sheet" which was used for convenience by Cooperative in negotiating separately with each distributor. This appears later in the Court's opinion, in which it is stated (R. I, 157a):

> "Time and time again throughout its argument the plaintiff directed the Court's attention to *the preliminary contracts* which it had offered as exhibits. These contracts, *or 'deal sheets,'* as they are called in the movie industry, are commonly used by booking agents in negotiating with the distributors for films for the various theaters which they represent. The plaintiff complains of the fact Mooney, in his negotiations with the distributor-defendants, customarily 'lumped together' all or a large number of his exhibitor clients in a single deal sheet. *Here again the evidence is ineffective to prove a conspiracy.*"

The District Court's conclusion, above emphasized, as to the so-called "deal sheet" negotiations is fully supported by its Findings of Fact Numbers 46, 47 and 48 (R. I, 172a, 173a).

Thus, the lower courts did not base their decisions on the grounds relied upon by petitioner as the premise of its first question. The fact that the theaters represented by Cooperative did not have common ownership played no part in the District Court's holding that Cooperative had no monopoly and had not attempted to monopolize, and that the distributor respondents were not influenced by Cooperative's representation of other theaters in their dealings with Cooperative for the Regent theater.

The entire first question which petitioner purports to present is based, moreover, on the assumption that "the crucial finding of fact by the Trial Court from which the judgment entered necessarily followed" (Pet. p. 14) was

Finding Number 85, that neither "Mooney nor Cooperative had or exercised or attempted to exercise monopoly power" in negotiations with the distributor respondents. This overlooks the fact that, even if the lower courts had found that Cooperative had monopoly power and attempted to exercise it in negotiations with distributor respondents, it was necessary that they further find that distributor respondents succumbed to the coercion of Cooperative in order to impose liability on them. The District Court found as a fact that the distributor respondents were not coerced (R. I, 180a):

> "86. None of the distributor defendants was intimidated or coerced in their actions in the Regent Moreland situation by any of the other defendants."

Petitioner does not undertake to demonstrate in this Court that this finding is clearly erroneous.

2. Petitioner's Second Question.

Petitioner's statement of the second question which it attempts to present is ambiguous. There is no separate discussion of it in petitioner's argument.

If petitioner means to suggest that Cooperative negotiated, in one negotiation, circuit license agreements covering both its competitive and non-competitive situation customers collectively, the discussion above demonstrates that the District Court found that the facts were otherwise. The Court of Appeals held that these findings were supported by substantial evidence.

If, on the other hand, petitioner contends that an exhibitor, or an agent representing exhibitors, such as Cooperative, cannot as a matter of law bargain at one conference separately for product for its competitive and non-competitive situations, theater by theater, there is no merit in such contention.

BLEED THROUGH POOR COPY

This Court has never indicated any impropriety in such a course of conduct. On the contrary, this Court recognized in *Griffith,* that the mere existence of large scale buying power, is not unlawful, saying (334 U. S., at p. 108):

> "Large-scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce."

It is only in those cases where non-competitive situation monopoly buying power has been used to obtain unlawful advantages covering both competitive and non-competitive situations that the result has been condemned. No such situation existed here. The District Court dealt realistically with petitioner's contention in this respect, saying (R. I, 157a):

> "* * * The frivolity of requiring Mooney to negotiate by means of a separate deal sheet and in a separate sitting for each of his clients is too obvious to require an extended explanation."

QUESTION II.

WAS PETITIONER INJURED IN ITS BUSINESS OR PROPERTY AS A RESULT OF ANY ACT OR ACTS OF RESPONDENTS ALLEGED OR CLAIMED BY PETITIONER TO HAVE BEEN IN VIOLATION OF THE ANTITRUST LAWS OF THE UNITED STATES?

The lower courts found that petitioner had failed to establish that any loss it suffered was attributable to conduct of the respondents.

Petitioner makes the wholly unsound contention that the District Court found that petitioner did not suffer any damages as a result of any acts of the respondents violative of the Anti-Trust Act merely as a necessary corollary

to its conclusion that there were no anti-trust law violations (Pet. p. 26). The District Court went further and found as a fact, and held as a matter of law, that "Plaintiff was not injured in its business or property and did not suffer any damage as a result of any act or acts of the defendants alleged or claimed by the plaintiff to have been in violation of the Anti-Trust Laws of the United States." (Fdg. 87, R. I, 180a; Conclusion of Law 3, R. I, 181a.)

Petitioner relies on certain language in the opinion of the District Court as supporting its contention that the Court did not intend to pass upon that question (Pet. p. 26). This statement, of which petitioner quotes only a portion, is, in its entirety, as follows (R. I, 160a):

> "Under no circumstances should this Court be taken as having decided that the deprivation of product plays no part in defeating the successful operation of a theater. *It has held merely that the deprivation of product in this case was prompted by considerations other than the monopolistic practices and conspiracy with which these defendants were charged.*"

Certainly, the clear purport of this language is directly contrary to any suggestion that the lower courts did not pass upon the question of injury or damage.

Petitioner is not entitled to judgment unless it has established by the evidence that there was a conspiracy and that, as a direct result thereof, it was in fact injured in its business or property. Finding 87 and Conclusion of Law 3 of the District Court are conclusive against petitioner on this point. The evidence amply supports that finding and that conclusion. Petitioner has not attempted to and cannot show that they are clearly erroneous.

BLEED THROUGH POOR COPY

CONCLUSION.

Petitioner has advanced no valid reason why a writ of certiorari should issue to the Court of Appeals for the Sixth Circuit.

In affirming the judgment below by unanimous decision, the Court of Appeals said:

> "We have thoughtfully considered the arguments advanced, the record in the case, the comprehensive and logically reasoned opinion of District Judge Freed (107 F. Supp. 453), together with his eighty-seven findings of fact, which are supported by substantial evidence and certainly are not clearly erroneous, and his seven conclusions of law, sustained by highest authority. Upon the basis of his opinion, findings and conclusions, we are of opinion that the judgment of the District Court should be affirmed, and that no worthwhile contribution would be made by this court by attempting to re-write in our own words the excellent opinion of the District Judge, who gave most conscientious study to the problems presented and has stated accurate conclusions."

Petitioner has not attempted to, and cannot, show that any of the findings of the District Court are clearly erroneous, *United States v. Oregon Med. Soc.*, 343 U. S. 326; *United States v. Gypsum Co.*, 333 U. S. 364; *United States v. Yellow Cab Co.*, 338 U. S. 338.

There is nothing in the decision of the District Court or of the Court of Appeals for the Sixth Circuit which is in conflict in any way with any decision of this Court or of any Court of Appeals. There is no question of law raised

by the petitioner which has not been, but which should be, settled by this Court.

Respectfully submitted,

LUTHER DAY,

Attorney for Distributor Respondents, Warner Bros. Distributing Corporation, Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., and Loew's Incorporated.

THOMAS M. HARMAN,
GEORGE H. RUDOLPH,

Of Counsel.

BLEED THROUGH POOR COPY